NO. 82-142

Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURRAY NEWMAN AND CAPITOL MOTORS, INC.,
Petitioners,

v.

HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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A MEMBER OF THE BAR OF THE
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QUESTION PRESENTED

Did the District Court Judge overstep the judicial powers vested in his office under Article III of the United States Constitution and the implementing legislation thereto, when upon his own motion he ruled:

> As the subpoena duces tecum is directed to one other than the petitioner and the petitioner does not claim any personal right or privilege with regard to the materials at issue, the petitioner lacks standing to contest the bank's amenability to compulsory process of this court. *Brown v. Braddick,* 595 F.2d 691, 697 (5th Cir. 1979). *Accordingly, the instant petition is hereby overruled and denied.* However, inasmuch as the instant subpoena duces tecum is a trial subpoena *United States v. International Business Machines Corporation,* 71 FRD 88 (S.D.N.Y. 1976), it is invalid due to the fact that it was issued by the clerk of this court for an action currently pending before the District Court for the Southern District of New York, Fed.R.Civ. P. 45(e). Accordingly the court hereby quashes the subpoena duces tecum served on the Trust Company Bank, sua sponte. (Order of Respondent annexed as Appendix B to the petition) (emphasis ours)

(The petition referred to in the aforecited decision was filed by one Murray M. Silver. This petition, filed under the ALL WRITS STATUTE, 28 U.S.C. section 1651, before the Respondent, sought to enjoin a bank from producing specific bank records of Murray A. Silver for use in the underlying New York Federal action); (copy of subpoena duces tecum is annexed as Appendix C).

NOTE: Trust Company Bank, 250 Piedmont Road, Atlanta, Georgia was served with the original summons. There are no other parties to the actions other than those appearing in the caption.

TABLE OF CONTENTS

Page

Question Presented i

Opinion Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of Facts 5

Reasons for Granting the Writ 9

Conclusion 11

CASES CITED

Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 382-383 9

Brown v. Braddick, 595 F.2d 691, 697 (5th Cir. 1979).....i

DeBeers Consolidated Mines v. United States, 325 U.S. 212 9

Roche v. Evaporated Milk Ass'n., 319 U.S. 21 9

Schlagenhauf v. Holden, 379 U.S. 104 9

United States v. International Business Machines Corporation, 71 FRD 88 (S.D.N.Y. 1976) i

Will v. United States, 389 U.S. 90, 95 9

STATUTES CITED

28 U.S.C. Section 1651 i

28 U.S.C. Section 1254(1) 2

OTHER AUTHORITIES

U.S. Supreme Court Rules 17 and 19 2

Supreme Court Rule 171(a) 2

U.S. Constitution Article 3, Sec. 1 2

U.S.C. Title 28, Sec. 1651(a) 3

U.S.C. Title 28, Rules 45(d)(1) and (e)(1) 3

APPENDICES

A—Order of the Eleventh Circuit Denying Petition for Writ of Mandamus 1a

B—Order of the U.S. District Court For The Northern District Of Georgia, Atlanta Division 2a

C—Subpoena and Affidavit 5a

D—Amended And Supplemental Complaint In U.S. District Court For The Southern District Of New York 10a

E—Letter Dated January 11, 1982 .....28a

F—Transcript Page 491 .....30a

G—Petition for Writ of Mandamus 31a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURRAY NEWMAN AND CAPITOL MOTORS, INC.,
Petitioners,

v.

HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Eleventh Circuit entered in the above case on the 21st day of April 1982.

OPINION BELOW

The Court of Appeals for the Eleventh Circuit denied the writ mandamus which sought to review the order below made and entered by the District Court for the Northern District of Georgia (Tidwell, J.). The writ was summarily denied without opinion. The order or judgment as

filed on the 21st day of April 1982 is reproduced in Appendix A to this petition.

JURISDICTION

The final order denying the writ mandamus was filed on the 21st day of April 1982 (Appendix A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rules 17 and 19 of the United States Supreme Court Rules. More particularly, petitioners cite the Court to Rule 171(a) contending that the summary determination of the writ mandamus by the Circuit Court:

> " . . . sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

(It should be noted that this determination was reached without requiring Respondent to file responsive papers in the Court below.)

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

I. Constitution of the United States, Article 3, Section 1:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

II. United States Code, Title 28, Section 1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

III. United States Code, Title 28, Rules 45(d)(1) and (e)(1):

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made,

the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(e) Subpoena for a hearing or trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

STATEMENT OF FACTS

In March 1982 there was pending in the Southern District of New York before the Hon. Robert W. Sweet, a Judge of that Court, the action of:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

80 Civ. 1775 (RWS)

MURRAY NEWMAN AND CAPITOL MOTORS INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LiBUTTI, a/k/a ROBERT PRESTI,
Defendants.

The aforecited non-jury trial commenced on January 13, 1982 and was still in progress when Respondent quashed the subpoena duces tecum on March 16, 1982 with the defendant Murray M. Silver scheduled to resume testimony on March 17, 1982.

It is not the purpose of this petition to dwell on the dispute that has been already tried and now awaits decision in the Southern District of New York. (Petitioners annex as Appendix D the pleadings of the New York action which indicate that the subject claims involved the nature of legal representation accorded to the petitioners in a prior cause wherein the said Murray M. Silver appeared as attorney for the petitioners.)

However, it is necessary for this Court in evaluating the proceedings before the Respondent Court to be afforded proper background as relates to the matter of the subject subpoena duces tecum (Appendix C).

However, it is necessary for this Court in evaluating the proceedings before the Respondent Court to be afforded proper background as relates to the matter of the subject subpoena duces tecum (Appendix C).

Prior to the commencement of the New York trial counsel for Murray M. Silver and counsel for the petitioners herein had arrived at an agreement which had been memoralized in Petitioners' Attorneys' letter of January 8, 1982. This letter reads as follows:

LUBIN & KATZ
ATTORNEYS AT LAW

January 11, 1982

Daniel Greenberg, Esq.
122 East 42nd Street
New York, New York 10017

Re: Newman v. Silver et al, 80 Civ. 1775 (RWS)

Dear Mr. Greenberg:

This letter will confirm our telephonic conversation of the morning of January 8, 1982 wherein you agreed to have the defendant Murray M. Silver produce at the trial the following:

1—Bank statements on Account (03-54-89-2).
2—Cancelled checks on Account (03-54-85-2) covering July and August 1978.

3—Bank statements on Escrow Account (01-83-93-2).
4—Cancelled check on Escrow Account (01-83-96-2) July and August 1978.

This will further confirm that you raised with me the problem of attorney-client privilege as to escrow funds of other clients.

Please accept this letter in lieu of a more formal notice to produce.

Very truly yours,

LUBIN & KATZ

By [signed] Robert A. Katz

[Appendix E to this Petition]

Then in the midst of trial and on January 19, 1982, defense counsel repudiated the agreement thus necessitating the issuance of subpoenas.

At this point of the trial and on or about January 20, 1982 the trial judge in New York issued a blanket subpoena directed at Murray M. Silver in the following terms:

> Judge Sweet (in robing room): This is to be deemed a subpoena Mr. Greenberg; anything that he has. He now does testify he has FBI notes. Anything he has relating to this case should be produced. (Tr. 921)
>
> [Appendix F]

In response to the foregoing, the defendant Murray M. Silver in mid-February produced the bank statements of the Trust Company Bank of Atlanta, Georgia wherein Mr. Silver maintained the subject accounts. However, when requested to produce the cancelled checks on the

bank accounts, defense counsel for Silver informed the trial court that such checks were lost and unavailable.

It is at this point that petitioners retained Georgia counsel to pursue the cancelled checks. Petitioners' Georgia counsel served a subpoena duces tecum upon the Trust Company Bank, a witness who will in no way contest the subpoena. However, defense counsel for Murray M. Silver, knowing full well that petitioners are scheduled to continue examination of Murray M. Silver in New York on March 17, 1982, filed a writ under 28 U.S.C. Sec. 1651(a) to ban the Bank from compliance. It is that writ which Respondent dismissed for lack of standing, at which time he also quashed the subpoena on his own motion. (Appendix B).

Thereafter, petitioners sought to review the order of Respondent pursuant to Rule 21(a) of the Federal Rules of Appellate Procedure. The Eleventh Circuit denied the petition for mandamus and petitioners now seek review of that denial before this Honorable Court (Appendix G).

(The Court is requested to note that on June 2, 1982 the Court of Appeals, Eleventh Circuit, also dismissed the appeal on a motion to dismiss filed by Murray M. Silver.)

REASONS FOR GRANTING THE WRIT

Petitioners fully appreciate that requesting review of the conduct of Respondent by petition for mandamus is not viewed with favor:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . As extraordinary remedies, they are reserved for really extraordinary causes."
>
> [Exparte Fahey, 332 U.S. 258, 259]

It is, however, respectfully argued by petitioners that the conduct of the Respondent Judge in quashing the subpoena pro forma upon his determination that the defendant in the New York action attorney Murray M. Silver had no standing to contest the subpoena, was an act in excess of the District Court's jurisdiction and, therefore, it should have been reviewed by Writ Mandamus which is the manner in which Appellate Courts seek . . .

> to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.
>
> [*Will v. United States,* 389 U.S. 90, 95]

There is no question but that this Court has the power to review a denial of mandamus as it relates to the conduct of Respondent. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21; *Bankers Life and Casualty Co. v. Holland,* 346 U.S. 379, 382-383; *Schlagenhauf v. Holden,* 379 U.S. 104; *DeBeers Consolidated Mines v. United States,* 325 U.S. 212.

In requesting that this Court grant such review, petitioners request that this Court examine the Petition for Mandamus (Appendix G) so that it will be clear upon the record that Respondent knew the following facts when he elected on his own motion to quash the subpoena:

1. That a subpoena had been issued by the trial judge directing that the subject bank records be produced by Murray M. Silver in the New York action.

2. That Murray M. Silver on January 25, 1982 . . . informed the court that the petitioner [Murray M. Silver] could not locate the records because his [unidentified] accountant had "lost" said records. (Appendix G).

3. That the New York Federal Court on or about February 26, 1982 adjourned the trial until March 17, 1982 to afford the plaintiffs in the New York action an opportunity to serve a subpoena duces tecum upon Trust Company Bank and to arrange for Georgia counsel to do so. (See order of Respondent Tidwell, Appendix B, page 1.)

4. That attorney Murray M. Silver of Atlanta, Georgia having informed the New York Court that the subject cancelled checks were unavailable and lost then brought a writ pursuant to 28 U.S.C. 1651 seeking to enjoin the Trust Company Bank from producing the subject cancelled checks (see order Respondent Tidwell, Appendix B).

If there was reason to quash the subpoena duces tecum in the circumstances herein outlined those reasons did not mandate the Court's interference on its own motion to correct form. it could be argued by Respondent that the subpoena duces tecum should have been secured under Rule 45(d) instead of Rule 45(e) and that such necessitated the taking of an identifying deposition. Peti-

tioners' response to such argument is to ask the Court to focuse on the fact that the documents sought were Murray M. Silver's checks and if they had been produced Murray M. Silver would have been the proper identifying witness of his own checks at the resumed trial on March 17, 1982.

In these circumstances the Court's intervention on a hypertechnical objection to form where the movant Murray M. Silver was found to have no standing to protest was a clear abuse of discretion and an exercise of power which does not compont with the role of independent arbiter and mandamus should have issued from the Eleventh Circuit to correct Respondent's conduct and unwarranted interference.

CONCLUSION

Petitioners pray that the petition for a writ of certiorari be granted.

ROBERT A. KATZ
Of Counsel
A MEMBER OF THE BAR OF THE
UNITED STATES SUPREME COURT

LUBIN AND KATZ
137-28 Northern Blvd.
Flushing, N.Y. 11351
(212) FL 3-2250

Attorneys for Petitioners

APPENDIX A—ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8197

IN RE: MURRAY NEWMAN AND CAPITOL MOTORS, INC.,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 21 1982
NORMAN E. ZOLLER
CLERK

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is denied.

APPENDIX B—ORDER OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE PETITION OF MURRAY M. SILVER FOR AN ORDER QUASHING A CERTAIN SUBPOENA DUCES TECUM PURPORTEDLY SERVED UPON TRUST COMPANY BANK, ATLANTA, GEORGIA AND RESTRAINING AND ENJOINING SAID TRUST COMPANY BANK OF ATLANTA FROM COMPLYING WITH OR OTHERWISE OBEYING SAID SUBPOENA DUCES TECUM

CIVIL ACTION NO. C82-509A

FILED CLERK'S OFFICE
BEN H. CANSAR, Clerk
By: s/ David Yuris
Deputy Clerk
3/16/82

ORDER

Petitioner in this matter is a defendant in an action currently pending before the United States District Court for the Southern District of New York entitled *Murray Newman and Capitol Motors, Inc. v. Murray M. Silver and Murray M. Silver, P.C.*, Docket Number 80 Civ. 1775 (RWS). The trial in the New York action commenced on January 13, 1982 and is still in progress. It appears from the statements of counsel that the trial in New York is scheduled to resume on Wednesday, March 17, 1982 with

the direct examination of petitioner Murray Silver. As also appears from the briefs and argument of counsel, the respondents, plaintiffs in the New York action, were informed by Mr. Silver sometime after the commencement of the trial in New York that he could not locate certain bank records that respondents desired produced. The respondents requested the trial judge in New York to order Mr. Silver to sign a release authorizing the Trust Company Bank, located here in Atlanta, to produce the missing records for the respondents. The trial judge refused to issue such an order.

Respondents then retained local counsel for the purpose of having a subpoena duces tecum issued in this district where the bank is located. A blank trial subpoena was obtained from the clerk of this court, which subpoena was completed and served upon the Trust Company Bank on March 9, 1982. The subpoena is a trial subpoena for the United States District Court for the Northern District of Georgia for documents to be produced in connection with an action pending before the United States District Court for the Southern District of New York. While it commands the bank to produce certain records at 3:00 p.m. on March 12, 1982 in the United States District Court for the Northern District of Georgia, the subpoena does not refer to a judge or magistrate of this district before whom the subpoena is returnable. Moreover, with the exception of the instant petition, there are no proceedings in the action referred to in the subpoena currently pending before a court in this district.

The petitioner brings this petition in the form of a request for a writ pursuant to 28 U.S.C. §1651 seeking to quash the subpoena issued to the Trust Company Bank. Accordingly, the instant petition will be treated as a motion to quash pursuant to Rule 45 of the Federal Rules of Civil Procedure. As the subpoena duces tecum is directed to one other than the petitioner and the petitioner does not

claim any personal right or privilege with regard to the materials at issue, the petitioner lacks standing to contest the bank's amenability to compulsory process of this court. *Brown v. Braddick*, 595 F.2d 691, 697 (5th Cir. 1979). Accordingly, the instant petition is hereby overruled and denied. However, inasmuch as the instant subpoena duces tecum is a trial subpoena, *United States v. International Business Machines Corporation*, 71 F.R.D. 88 (S.D.N.Y. 1976), it is invalid due to the fact that it was issued by the clerk of this court for an action currently pending before the District Court for the Southern District of New York. Fed. R. Civ. P. 45(e). Accordingly, the court hereby quashes the subpoena duces tecum served on the Trust Company Bank, sua sponte.

SO ORDERED, this 16 day of March, 1982.

s/ G. Ernest Tidwell

G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX C—SUBPOENA AND AFFIDAVIT

CIVIL SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Murray Newman and Capitol Motors, Inc.

vs.

Murray M. Silver, Murray M. Silver, P.C. and Ralph Libutti, a/k/a Robert Presti

To Mr. Roy Gibson,
Mgr. of Summons
Trust Company Bank
250 Piedmont Road
Atlanta, Georgia

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Northern District of Georgia in the City of Atlanta, on the 12th day of March 1982 at 3:00 o'clock P.M. to bring with you the following records covering account numbers 03-54-85-2 (special count) and 01-83-96-2 (escrow account)

1. The Bank's copy of a check in the amount of $30,000.00 dated on or about August 4, 1978, drawn on the escrow account

2. The bank's copy of a check in the amount of $30,000.00 dated on or about August 11, 1978, drawn on the escrow account.

3. The bank's copy of a check in the amount of $12,500.00 dated on or about August 21, 1978, drawn on the escrow account.

4. The bank's copy of a check in the amount of $12,500.00 dated on or about August 24, 1978, drawn on the escrow account.

5. Documentation concerning a deposit into the escrow account of $27,860.00 on October 23, 1978 and a withdrawal of $28,000.00 on that same date.

March 9, 1982
s/ J. Robert Cooper
Attorney for Plaintiff
1401 Peachtree St. NE
Atlanta, Georgia 30309

BEN H. CARTER
by s/ Spencer D. Messa
Deputy Clerk.

AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOLMOTORS INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C., and RALPH LIBUTTI, also known as ROBERT PRESTI,

Defendants.

---

80 Civ. 1775 (RWS)

STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

ROBERT A. KATZ, being duly sworn, deposes and says:

1. I am a member of LUBIN & KATZ, attorneys of record for the plaintiff in the within entitled action which is being tried before the Hon. Robert W. Sweet, Judge of the United States District Court of the Southern District of New York under docket No. 80 Civ. 1775 (RWS).

2. The next session of this non jury trial is scheduled for March 16, 1982 for the purpose of plaintiffs' continued direct examination of the co-defendant MURRAY M. SILVER.

3. During the course of the trial it was discovered that the defendant SILVER had deposited certain monies given to him by the plaintiff, CAPITOL MOTORS INC. in the following accounts at the Trust Company of the Bank of Atlanta, Georgia:

a) 03-54-85-2 (Special Account)
b) 01-83-96-2 (Escrow Account)

4. During the course of the trial is was represented by the defendant, MURRAY M. SILVER, that he could not locate his records for the year 1978.

5. Therefore, it now becomes necessary to seek to subpoena the records of The Trust Company of the Bank of Atlanta. More particularly, we seek the following:

a. The bank's copy of a check in the amount of $30,000.00 dated on or about August 4, 1978.
b. The bank's copy of a check in the amount of $30,000.00 dated on or about August 11, 1978.
c. The bank's copy of a check in the amount of $12,500.00 dated on or about August 21, 1978.
d. The bank's copy of a check in the amount of $12,500.00 dated on or about August 24, 1978.

6. Each of the checks described in paragraph 5 above are checks drawn on the escrow account of the defendant, MURRAY M. SILVER.

7. In addition plaintiff seeks documentation as to a deposit in the escrow account of $27,860.00 on October 23, 1978 and a withdrawal of $28,000.00 on that same date.

8. It is necessary to seek the aid of the District Court in Atlanta because in this diversity suit the Southern District of New York's jurisdiction does not encompass Atlanta, Georgia.

9. For the purposes of the ancillary aid herein sought, the plaintiffs have retained Cooper and Weintraub to bring proceedings in Atlanta, Georgia.

WHEREFORE, I request that the District Court in Atlanta, Georgia issue its subpoena for the records of The Trust Company of Atlanta, Georgia relating to the bank accounts of MURRAY M. SILVER upon the payment of proper fees.

Sworn to before me this
8th day of March, 1982
s/ Patricia R. Vanya
Notary Public
PATRICIA R. VANYA
Notary Public, State of New York
No. 41-450649, Qual. in Queens Co.
Certificate filed in New York County
Commission expires March 30, 1983

s/ Robert A. Katz
ROBERT A. KATZ

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

GERTRUDE BLOOM being duly sworn, says:

I am not a party to the action, am over 18 years of age and reside at Queens County, New York.

On March 8, 1982 I served a true copy of the annexed Affidavit in the following manner: by mailing same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

Daniel H. Greenberg, Esq.
122 E. 42nd Street
New York, N.Y. 10017

Woodcock & McClure, Esqs.
210 River Street
Hackensack, N.J. 07601
Att. Larry McClure, Esq.

APPENDIX D—AMENDED AND SUPPLEMENTAL COMPLAINT IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LIBUTTI, also known as ROBERT PRESTI,

Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs, by their attorneys, LUBIN & KATZ, complaining of defendants as described herein, respectfully show and allege:

DEFINITIONS

(a) The word "plaintiff" or "plaintiffs" wherever used in the following pleading is defined as plaintiff, MURRAY NEWMAN or plaintiff CAPITOL MOTORS, INC. of whom MURRAY NEWMAN was a principal and corporate officer and is used interchangeably throughout this pleading.

(b) The word "defendant" denotes MURRAY M. SILVER and MURRAY M. SILVER, P.C. except where it refers to defendant ROBERT PRESTI also known as RALPH LIBUTTI.

JURISDICTION

1. Jurisdiction in this action is predicated upon 28 U.S.C. 1332 upon the ground that there is diversity of-citizenship among the plaintiffs and the defendants and the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive in interest and costs.

2. That plaintiffs plead that this Court also has jurisdiction over the person of the defendents and the subject matter of the action pursuant to CPLR 302 in that the alleged conduct and transactions of representing the plaintiff as an attorney in the case of the UNITED STATE OF AMERICA v. NEWMAN, et al took place in the County, City and State of New York. That all services material to that representation as attorney for the plaintiffs CAPITOL MOTORS, INC. and MURRAY NEWMAN, except for incidental matters such as out of state conferences, were rendered in the County, City and State of New York, including but not limited to the place where plaintiffs actually retained the defendant as their attorney. Further, that the acts or misrepresentation as including those described in paragraph 12 of this complaint occurred in the County, City and State of New York except certain acts occurring in Bronx County.

THE PARTIES

3. Plaintiff MURRAY NEWMAN is a citizen of the State of New York residing in Nassau County.

4. Plaintiff CAPITOL MOTORS, INC. is a domestic corporation formed under the laws of the State of New York and is a citizen thereof with its principal place of business in Bronx County

5. Defendant MURRAY M. SILVER is a citizen of the State of Georgia, residing in Atlanta, Georgia.

6. Upon information and belief, defendant MUR-

RAY M. SILVER, P.C. is a professional corporation formed under the laws of the State of Georgia, with its principal place of business in Atlanta, Georgia.

7. Upon information and belief, defendant ROBERT PRESTI also known as RALPH LI BUTTI is a citizen of the State of New Jersey.

CLAIM I BY PLAINTIFFS AGAINST MURRAY M. SILVER AND MURRAY M. SILVER, P.C.

8. At the times herein mentioned and upon information and belief, the defendant was an attorney duly admitted to practice law before various State and Federal Courts and had the legal capacity to act as an attorney for the plaintiffs in the United States District Court for the Southern District of New York in the case of UNITED STATES OF AMERICA v. NEWMAN, et al. under Docket No. 78CR 259. Included as defendant is MURRAY M. SILVER, P.C.

9. That during the period of the attorney-client relationship the plaintiff gave the defendant full trust and confidence and the defendant undertook to advise and counsel the plaintiff in all matters relating to the then pending case of UNITED STATES OF AMERICA v. NEWMAN, et al.

10. Upon information and belief, either prior to or at the time of retainer, the defendant knew that the plaintiff had elected to discharge the prior attorneys because plaintiff had lost confidence in the prior attorneys and plaintiff was insisting on taking the matter to trial.

11. That plaintiff only elected to retain the defendant and pay the defendant's fee upon the assurance that plaintiff would have a trial.

12. That plaintiff only elected to plead guilty after the defendant had told him that he, the defendant, when meeting with the prosecutor had seen a notation on the

prosecutor's file which he, the defendant, related to plaintiff as reading "10 years, $450,000.00 fine, extensive newspaper publicity.

13. That upon information and belief plaintiff now knows that defendant's representation was false. That the conduct heretofore described as to this defendant in representing the plaintiff is of the nature which is an affront and burden upon the processes of justice and is generally detrimental to the public at large and defendant should suffer punitive damages in the sum of Two Million ($2,000,000.00) Dollars.

14. That as a result of defendant's false representation, plaintiff gave up the valuable right of trial by jury and entered a plea of guilty to certain counts of the indictment.

15. By reason of the actions hereinbefore alleged, defendant breached his duty to the plaintiff and failed to properly represent plaintiff, all to the plaintiff's damage in the sum of Two Million ($2,000,000.00) Dollars. Plaintiffs also request an award of reasonable attorney's fees as may be fixed by the Court.

CLAIM II BY PLAINTIFFS AGAINST DEFENDANTS MURRAY M. SILVER AND MURRAY M. SILVER, P.C.

16. Plaintiff repeats and reiterates Paragraphs 1 through 15 inclusive as fully set forth herein.

17. That upon information and belief the defendant failed to accord plaintiff proper legal representation in that:

(a) Defendant failed to research the sections of the law under which the Court sentenced plaintiff.

(b) Defendant brought persons before the Court to speak for the plaintiff by letter and phone calls who were not part of the residential business or social

community of the plaintiff and who had no prior intercourse with the plaintiff.

18. That during the time the defendant acted as attorney for plaintiff defendant failed to exercise reasonable care and diligence in investigating the case, in researching the law, and in preparing for trial, in representing the plaintiffs at plea and sentence, as required of an attorney rendering proper and ethical representation in a criminal case.

19. That during the course of defendant's representing the plaintiff, the defendant plagiarized in whole or in part certain work which had already been done by the plaintiff's prior attorneys, which defendant adopted and represented as his own.

20. That the conduct heretofore described as to this defendant in representing the plaintiffs is of the nature which is an affront and burden upon the processes of justices and is generally detrimental to the public at large and defendant should suffer punitive damages in the sum of Two Million ($2,000,000.00) Dollars.

21. That at the time of the representations and negotiations hereinbefore referred to, the defendant knew that the plaintiff was not knowledgeable concerning the matters involved. That plaintiff had never, prior to this time, participated in a felony criminal proceeding and that plaintiff relied on defendant's professional skill, judgment, knowledge and integrity throughout the course of defendant's representation.

22. That by reason of the conduct hereinbefore alleged defendant breached his duty to the plaintiff and failed to accord proper representation as an attorney and counselor-at-law, all to plaintiffs' damage and plaintiffs seek damage both compensatory and general in the sum of Two Million ($2,000,000.00) Dollars, together with an award of reasonable attorney's fees as may be fixed by the Court.

CLAIM III BY PLAINTIFFS AGAINST DEFENDANTS PRESTI AND SILVER

23. Plaintiff repeats and reiterates Paragraphs 1 through 22 inclusive as if fully set forth herein.

24. Upon information and belief, the defendant RALPH LIBUTTI a/k/a ROBERT PRESTI (hereinafter referred to as "PRESTI") was a friend and acquaintance of the co-defendant SILVER prior to the time when PRESTI first met the plaintiff MURRAY NEWMAN in July, 1978.

25. That upon information and belief, the defendant PRESTI previous to July, 1978, had acted as a courier of cash monies and a solicitor of cases on behalf of the co-defendant MURRAY M. SILVER.

26. Upon information and belief, the co-defendant PRESTI, prior to the time that he spoke to the plaintiff MURRAY NEWMAN about retaining MURRAY M. SILVER, agreed with the co-defendant SILVER to solicit plaintiff MURRAY NEWMAN's pending case to the end that MURRAY NEWMAN would discharge his present counsel and retain MURRAY M. SILVER.

27. That as part of this solicitation, it was agreed between PRESTI and the co-defendant SILVER that the plaintiff MURRAY NEWMAN would be told by PRESTI that the co-defendant MURRAY M. SILVER had at PRESTI's request made inquiries to the Justice Department relating to the plaintiffs' criminal case and it was furthr agreed between the co-defendants that PRESTI would convince the plaintiff MURRAY NEWMAN that MURRAY M. SILVER had learned that Paul Parito, then the attorney for the plaintiff MURRAY NEWMAN, had mishandled the plaintiff's criminal case and that only this highly competent attorney, MURRAY M. SILVER, with friends in high places, could save the case.

28. That upon information and belief, the defendant

PRESTI knew that the statements which he was about to make to the plaintiff MURRAY NEWMAN in order to solicit the subject criminal case and induce MURRAY NEWMAN to retain MURRAY M. SILVER were in material parts false and untrue and that PRESTI then uttered them to the plaintiff MURRAY NEWMAN in reckless disregard of their truth or falsity.

29. That in furtherance of the wrongful solicitation and prior to plaintiff's retaining co-defendant SILVER, and prior to the plaintiff's payment of the retainer, the co-defendant PRESTI, having knowledge of the pendency of UNITED STATES OF AMERICA v. NEWMAN, et al. under Docket No. 78CR 259, approached the plaintiff MURRAY NEWMAN and others and made the following representations to the plaintiff MURRAY NEWMAN and others, to induce the hiring of SILVER:

(a) PRESTI told MURRAY NEWMAN that SILVER had made inquiries on the file and that Paul Parito who was then the attorney for MURRAY NEWMAN had built the case out of all proportions and that the case could be resolved easily by retaining MURRAY M. SILVER.

(b) PRESTI told MURRAY NEWMAN that SILVER was a highly competent attorney, knowledgeable in all respects of criminal law, and whose personal friends were the Honorable Jimmy Carter and the Honorable Griffin Bell.

(c) PRESTI told MURRAY NEWMAN that if SILVER takes your case, you have nothing to worry about.

30. In July, 1978, PRESTI had a telephone communication with the co-defendant MURRAY M. SILVER.

31. As a result of the aforedescribed communication, co-defendant SILVER flew to New York City to meet with the plaintiffs.

32. On or about July 28, 1978, a meeting took place in New York City, at which the following were present:

(a) PRESTI
(b) SILVER
(c) Phyllis Newman
(d) Gary Newman
(e) MURRAY NEWMAN.

33. As a result of that meeting and subsequent thereto, plaintiffs discharged their prior attorney and retained MURRAY M. SILVER to represent them in the criminal proceeding as previously described in Paragraph 8.

34. Co-defendant PRESTI was given cash by the plaintiff or plaintiffs agents or servants in the approximate sum of $200,000.00, part of which or all of which, upon information and belief, was delivered to the co-defendant SILVER in Atlanta, Georgia as part payment by plaintiffs of the legal fee to the co-defendant SILVER.

35. Subsequent thereto, defendant PRESTI was present at substantially all conferences with plaintiff held with the defendant SILVER in the State of New York, and posing as plaintiff NEWMAN's friend, assisted in SILVER's efforts to convince plaintiff to pleade guilty.

36. That upon information and belief, the aforedescribed agreement contemplated that defendant PRESTI would retain part of the legal fees.

37. Plaintiff now knows that the representations made relating to the fact that SILVER would try the criminal case of the plaintiff was substantially false and misleading and the conduct of PRESTI and SILVER, including the representations was fraudulent and deceitful in that SILVER never intended to do anything else but plead the plaintiffs guilty and that SILVER at no time intended to take the subject case to trial and never prepared for trial.

38. That as a result of the wrongful acts of the defendants, plaintiffs were forced to part with approximately $290,000.00, which plaintiff paid to defendants under false pretenses, all to the damage of the plaintiffs in the sum of approximately $290,000.00, plus expenses incurred by SILVER while attending plaintiffs in New York.

THE FOLLOWING PARAGRAPHS 39-48 STRICKEN BY COURT ORDER

39. That upon information and belief the wrongful conduct of defendant SILVER is not limited to the instant action but has been exhibited in defendant SILVER's relations with other legal clients.

40. That the scheme defendant SILVER has exhibited is to:

(a) Advise a criminal defendant who is presently representated by an attorney to discharge his attorney because that attorney was incompetent and not properly representing his client.

(b) That defendant SILVER then advised the criminal defendant that as defendant's new attorney he can guarantee a good result because he has influence with persons in the government, particularly the Justice Department.

(c) That defendant SILVER then tells the criminal defendant that he would do certain work in order to induce payment of the retainer.

41. That one Vincent Lynch was a criminal defendant convicted of racketeering in the Federal Court of Florida.

42. That during the trial and post trial period Vincent Lynch was represent by Alan Weinstein, Esq. That subsequent to the trial defendant SILVER sought out and actively solicited Vincent Lynch to become his client.

43. That the substance of this solicitation was to convince Lynch to discharge Alan Weinstein, Esq. because according to defendant SILVER, Alan Weinstein had failed to properly represent Vincent Lynch at trial.

44. That defendant SILVER also, in order to induce Vincent Lynch to retain defendant SILVER, told Vincent Lynch that Alan Weinstein would not file a brief for Vincent Lynch.

45. That defendant SILVER also, in order to induce Vincent Lynch to retain defendant SILVER, told Vincent Lynch he would make a motion for bail pending appeal.

46. That defendant SILVER was paid a retainer by Vincent Lynch of $2,500.00.

47. That defendant SILVER did not make the application for bail pending appeal.

48. That defendant SILVER only paid restitution of the retainer when Alan Weinstein, as attorney for Vincent Lynch, threatened legal action.

CLAIM IV BY PLAINTIFFS AGAINST DEFENDANTS PRESTI AND SILVER

49. Plaintiff repeats and reiterates paragraphs 1 through 48 inclusive as if fully set forth herein.

50. Plaintiffs, by their agents or servants delivered cash in the approximate sum of $200,000.00 to defendant PRESTI for the purpose of delivering same to the co-defendant MURRAY M. SILVER as part of his legal fee.

51. Upon information and belief, defendant PRESTI in the early weeks of August, 1978 made two trips to Atlanta, Georgia, to deliver the subject cash monies to defendant MURRAY M. SILVER.

52. On or about the 23rd day of July, 1980, the plaintiff, during the deposition of MURRAY M. SILVER, heard the defendant MURRAY M. SILVER testify that such monies were not delivered by PRESTI to MURRAY

M. SILVER and that such monies were not owed to MURRAY M. SILVER.

53. That the defendant PRESTI never accounted for the subject cash to the plaintiff.

54. In or about the first week of August, 1978, either defendant PRESTI or defendant MURRAY M. SILVER converted for his own use and benefit, or both defendants jointly converted for their own use and benefit, the subject cash monies, which monies remain the property of the plaintiffs.

WHEREFORE, plaintiffs demand judgment against defendants MURRAY M. SILVER, MURRAY M. SILVER, P.C., and ROBERT PRESTI as follows:

(A) On the first claim, plaintiff demands compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER and MURRAY M. SILVER, P.C. jointly and severally.

(B) On the second claim, plaintiff demands compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER and MURRAY M. SILVER, P.C. jointly and severally.

(C) On the third claim, plaintiffs demand compensatory damages of $2,000,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against defendant MURRAY M. SILVER, MURRAY M. SILVER, P.C. and ROBERT PRESTI, jointly and severally.

(D) On the fourth claim, plaintiffs demand the return of the converted monies in the approximate sum of $200,000.00 and punitive damages of an additional $2,000,000.00 including reasonable attorneys' fees, and this demand is made against MURRAY M. SILVER,

MURRAY M. SILVER, P.C. and ROBERT PRESTI, seeking the recovery of converted monies.

(E) Costs and disbursements in this action, including an award for reasonable attorneys' fees.

s/ Lubin & Katz
LUBIN & KATZ
Attorneys for Plaintiffs
Office & Post Office Address
137-28 Northern Boulevard
Flushing, New York 11354
(212)FL 3-2250

[Verified by Murray Newman May 11, 1981]

AMENDED ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

-against-

MURRAY M. SILVER, MURRAY M. SILVER, P.C. and RALPH LiBUTTI, also known as ROBERT PRESTI,
Defendants.

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80 Civ. 1775 (RWS)

Defendant, Ralph LiButti, by his attorneys Moore,

Berson, Lifflander & Mewhinney, as and for his amended answer to the amended and supplemental complaint, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6 of the amended and supplemental complaint.

2. Denies each and every allegation contained in paragraph 7 of the amended and supplemental complaint, except alleges that defendant, Ralph LiButti, also known as Robert Presti, is a citizen of the State of New Jersey.

AS AND FOR AN ANSWER TO CLAIM 1

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 8 through 15 of the amended and supplemental complaint.

AS AND FOR AN ANSWER TO CLAIM 2

4. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 16 of the amended and supplemental complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17 through 22 of the amended and supplemental complaint.

AS AND FOR AN ANSWER TO CLAIM 3

6. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 23 of the amended and supplemental complaint.

7. Denies each and every allegation contained in paragraph 24 of the amended and supplemental complaint, except alleges that defendant, Ralph LiButti, had met Murray Silver prior to July, 1978.

8. Denies each and every allegation contained in paragraphs 25 through 29 of the amended and supplemental complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 30 and 31 of the amended and supplemental complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the amended and supplemental complaint.

11. Denies each and every allegation contained in paragraphs 34 through 38 of the amended and supplemental complaint.

12. Makes no response to paragraphs 39 through 48 of the amended and supplemental complaint, which paragraphs were stricken by court order.

AS AND FOR AN ANSWER TO CLAIM 4

13. Repeats and realleges each and every admission and denial made in response to the allegations incorporated by reference in paragraph 49 of the amended and supplemental complaint.

14. Denies each and every allegation contained in paragraph 50 of the amended and supplemental complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the amended and supplemental complaint.

16. Denies each and every allegation contained in paragraph 53 of the amended and supplemental complaint, except alleges that no accounting was ever demanded of him.

17. Denies each and every allegation contained in paragraph 54 of the amended and supplemental complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein with respect to defendant, Murray M. Silver.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

18. The Court lacks jurisdiction over the person of this defendant.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

19. Insufficiency of service of process upon this defendant.

WHEREFORE, defendant, Ralph LiButti, demands judgment dismissing the amended and supplemental complaint, together with costs and disbursements of this action.

MOORE, BERSON, LIFFLANDER
& MEWHINNEY
By s/ Michael Sullivan
A Member of the Firm
Attorneys for Defendant
Ralph LiButti
555 Madison Avenue
New York, N.Y. 10022
(212) 838-0600

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Plaintiffs,

v.

MURRAY M. SILVER, MURRAY M. SILVER, P.C., and RALPH LIBUTTI, also known as ROBERT PRESTI,
Defendants.

---

80 Civ. 1775 (RWS)

Defendants Murray M. Silver and Murray M. Silver, P.C., by Daniel H. Greenberg, their attorney, for their answer to the amended and supplemental complaint, allege:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "1", "2", "3", "4", "7", "28", "29", "29(a)", "29(b)", "29(c)", "30", "33" and "53" of the amended and supplemental complaint.

2. Admit the allegations of paragraphs "5" and "6" of the amended and supplemental complaint.

3. Admit so much of the allegations of paragraph "8" of the amended and supplemental complaint as purports to refer to defendant Murray M. Silver, where the allegations states "the defendant", and as to defendant Murray M. Silver, admit that at all times relevant to this action defendant Murray M. Silver, was and is an attorney

at law duly admitted to practice law in the State of Georgia and duly admitted to practice law in various federal courts in the State of Georgia and elsewhere, including the United States District Court for the Southern District of New York, but deny each and every allegation of said paragraph "8" as relates to defendant Murray M. Silver, P.C.

4. Deny each and every allegation of paragraphs "9", "10", "11", "12", "13", "14", "15", "17", "18", "19", "20", "21", "22", "25", "26", "27", "35", "36", "37", "38", "50", "51" and "54" of the amended and supplemental complaint.

5. Deny each and every allegation of paragraph "31" of the amended and supplemental complaint, except admit so much thereof as alleges that on or about July 28, 1978, defendant Murray M. Silver travelled to New York, New York from Atlanta, Georgia.

6. Admit so much of allegations of paragraph "32" of the amended and supplemental complaint as purports to allege that the persons named therein were present together on the alleged occasion, and deny each and every other allegation of said paragraph "32".

7. Deny each and every allegation of paragraph "34" of the amended and supplemental complaint, except deny knowledge or information sufficient to form a belief as to the truth of so much of the allegations thereof as purport to allege that defendant Ralph LiButti, referred to therein as "Robert Presti", was "given cash by the plaintiff or plaintiff's agents or servants in the approximate sum of $200,000.00."

8. With respect to the allegations of paragraphs "39", "40", "41", "42", "43", "44", "45", "46", "47" and "48" of the amended and supplemental complaint, since these allegations have been ordered stricken by the court, there will be no responsive pleading thereto.

9. Deny each and every allegation of paragraph "52" of the amended and supplemental complaint, and for the full, true and correct testimony of defendant Murray M. Silver at his oral pre-trial deposition conducted in this action, refer to the transcript thereof.

WHEREFORE, defendants Murray M. Silver and Murray M. Silver, P.C., demand judgment dismissing the complaint, together with the costs and disbursements of this action.

s/ Daniel H. Greenberg
DANIEL H. GREENBERG
Attorney for Defendants
Murray M. Silver and Murray
M. Silver, P.C.
122 East 42nd Street
New York, New York 10168
(212) 697-0133

APPENDIX E—LETTER DATED JANUARY 11, 1982

[Letterhead of Lubin & Katz, 137-28 Northern Blvd., Flushing, N.Y. 11354 (212) FL 3-2250]

January 11, 1982

Daniel Greenberg, Esq.
122 East 42nd Street
New York, New York 10017

Re: *Newman v. Silver et al 80 Civ. 1775 (RWS)*

Dear Mr. Greenberg:

This letter will confirm our telephonic conversation of the morning of January 8, 1982 wherein you agreed to have the defendant Murray M. Silver produce at the trial the following:

1—Bank statements on Account (03-54-89-2).
2—Cancelled checks on Account (03-54-85-2) covering July and August 1978.
3—Bank statements on Escrow Account (01-83-93-2).
4—Cancelled checks on Escrow Account (01-83-96-2) covering July and August 1978.

This will further confirm that you raised with me the problem of attorney-client privilege as to escrow funds of other clients.

Please accept this letter in lieuof a more formal notice to produce.

Very truly yours,

LUBIN & KATZ

by s/ Robert A. Katz
ROBERT A. KATZ

RAK:js

APPENDIX F—TRANSCRIPT PAGE 491

Judge Sweet (in robing room): This is to be deemed a subpoena Mr. Greenberg; anything that he has. He now does testify he has FBI notes. Anything he has relating to this case should be produced.

(Tr. p. 491) (January 14, 1982) (A copy of which to be provided).

APPENDIX G—PETITION FOR WRIT OF MANDAMUS

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MURRAY NEWMAN AND CAPITOL MOTORS, INC.,

Petitioners,

v.

HONORABLE G. ERNEST TIDWELL, JUDGE FOR THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Petitioners, MURRAY NEWMAN AND CAPITOL MOTORS, INC., through undersigned counsel, respectfully petition this Court to issue a Writ of Mandamus pursuant to Rule 21(a) of the Federal Rules of Appellate Procedure, as derived from 28 USC 1651, directed to the Honorable G. Ernest Tidwell, Judge of the United States District Court of the Northern District of Georgia, the Respondent, and in support of this application petitioners state:

I. ORDER BELOW

On March 16, 1982, Respondent entered an order *sua sponte,* quashing a *subpoena duces tecum* issued by Petitioner to Trust Company Bank, Atlanta, Georgia, a non-party in an action pending in the United States District Court for the Southern District of New York. A copy of

the order issued by Judge Tidwell is attached hereto as Exhibit A and incorporated herein by reference.

II. STATEMENT OF FACTS

On or around March of 1980, a civil action raising claims of legal malpractice against Murray M. Silver, Esq., the Defendant herein, was filed in the Supreme Court of the State of New York (Bronx County). The case was subsequently removed from State to Federal Court pursuant to 28 USC 1441.

On July 24, 1980, during the course of pre-trial discovery Attorneys for Petitioner in the New York action, requested copies of all records and documents in Defendant Silver's possession relating to *inter alia*, certain account with the Trust Company Bank of Atlanta, Georgia. From the outset Mr. Silver was extremely uncooperative and evasive. In response to repeated requests by Attorneys for Petitioner in the New York action, Mr. Silver eventually related the unfortunate, but fortuitous, spilling of coffee over the file containing many of the requested documents rendering them unsalvageable. This incident was disclosed during a deposition taken of Mr. Silver, in which he testified:

> Q. Do you have with you the file for the case of United States of America against Murray Newman Capitol Motors—
>
> *******
>
> Q. Can you show us the results of whatever legal research you or your associates did on behalf of the Plaintiffs?
>
> A. Counsel, as I told Mr. Katz yesterday, I had, roughly speaking, oh, God, I guess, a hundred 50 to a hundred 60 pages, together with some other records in this case.
>
> Two weeks ago, unbeknowing to me, the secretary that was working there part-time spilled a container with coffee, cream and sugar on the files and I didn't know it was done until several days had passed.

When I got them, they were just—it was just absolutely impossible for me to even separate them. They all stuck together.

Q. Mr. Greenberg: Do you still have the papers?

A. The Witness: No we had to throw them away because they attracted ants and roaches.

Tr. p. 74. Deposition of Murray Silver, July 24, 1980) (Exhibit B attached hereto).

Subsequently, Attorneys for Petitioner began narrowing their requests for documents that were not "destroyed" by the unfortunate incident, focusing primarily on the bank records and checks.

In the weeks preceding the commencement of the trial on January 13, 1982, negotiations between Petitioner's New York Attorneys and Mr. Greenberg, Mr. Silver's Attorney, led to an agreement with Mr. Greenberg to provide the requested documents and checks without further resort to formal judicial process. This agreement was memorialized in a letter from Petitioner's Attorney dated January 8, 1982, (Exhibit C a copy of which will be provided to the Court). Despite the agreement, Mr. Greenberg denied its existence, necessitating the issuance of a subpoena to Mr. Silver for all requested documents by the New York Court (Exhibit D, attached hereto). Seemingly, angered Mr. Silver's lack of responsiveness, the trial judge also subsequently issued a subpoena to Mr. Silver requesting all documents relating to the case. *See,* Trial Tr. 491 (1/14/82), attached as Exhibit D-1)

Although certain bank statements were ultimately produced, another unfortunate, but fortuitous, accurence prevented the production of the requested checks. According to Mr. Silver, his accountants were given all bank records, including the checks, and for some unexplained reason could not find them. As recounted by Mr. Silver during trial:

Q. Can you tell us why you could not produce the originals of the records here?
A. The originals of what records?
Q. Of the bank records.
A. Of the bank records that you subpoenaed?
Q. The bank records, July through October 1978.
A. Sir, as we stated before, as I stated before, I was audited by the Internal Revenue Service. As I recall it, once again, I'm not going to be absolutely certain, but as I recall it, it was during the year 1980. All my records were referred to my accountants. And they handled the audit. I'm about the world's worst bookkeeper and mathematician. And they handled my bank account completely, even to the point that they balanced my checkbook.
Q. It is your recollection—
Mr. Greenberg: Has he finished his answer?
The Court: Have you finished, Mr. Silver?
Q. Do you wish to continue, Mr. Silver?
A. I think I've finished, sir.
Q. Can you tell us what that has to do with your not having produced the original of the records?
A. Well, as I indicated to you before, when I received the subpoena before, I went back to Atlanta, Georgia to obtain the records in compliance with the subpoena. When I got there, as I recall, you only gave me a day or two to do this. And I was in New York when you gave me the subpoena. And so I had to go back to Atlanta at my expense and search my office for those particular bank statements that you have reference to I think I indicated to you at that time that I had just moved from my offices in Colony Square to my new office in the Life of Georgia Tower in Atlanta. I searched the facility that was available to me to see if I could come up with the statements. I could not find them. I called my accountants. They indicated to me that they would search for them. They said that they could not find them.

Now, they have moved since all of this took place. So when I could not come up with the original records, then I called the trust company back and asked them could they

get the records for me. And that's how I got them and that's what we delivered to the Court.
Q. Did you make an effort to obtain these records from your accountants?
A. Yes, I said that, Mr. Lebron.
Q. What did they say, if anything?
A. Their statement to me, sir, I've just stated that, sir, that they searched their facilities and they could not find that which I referred to them.
Q. In short, was it their contention that these records had been lost?
A. No, sir. They did not say that at all.

(See Tr. p. 37-39. Testimony of Murray Silver, March 17, 1982) (Exhibit E, attached hereto).

Mr. Silver did, however, manage to obtain duplicate bank statements from Trust Company Bank, but for some reason, did not bother to obtain copies of the checks.

Soon thereafter, the undersigned counsel was retained to subpoena the checks directly from Trust Company Bank. A subpoena *duces tecum* was issued to the bank returnable to the office of the Clerk for the United States District Court for the Northern District of Georgia. (Exhibit F, attached hereto). Although the bank was ready, willing and able to comply with the subpoena, Mr. Silver objected and filed a motion to quash. Judge Tidwell dismissed Mr. Silver's petition for lack of standing, but then quashed the subpoena *sua sponte* under the erroneous presumption that it was a trial subpoena, and thus, beyond the jurisdiction of this Court.

III. ISSUE PRESENTED

The sole issue presented to this Court is whether Respondent abused his discretion in quashing petitioner's *subpoena duces tecum* without complete knowledge of the total facts and circumstances surrounding its issuance.

IV. REASONS WHY WRIT SHOULD ISSUE

It is well settled that a writ of mandamus is appropriately issued when there is a clear abuse of discretion on the part of the Judge. *Schlagenauf v. Holder,* 379 US 104, 109-10 (1964); *Bankers Life and Casualty Co. v. Holland,* 346 US 379, 383 ( ). Generally "[a] Judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision." *Premium Service Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225 (9th Cir. 1975) Respondent herein is guilty of both infirmities above mentioned, and has clearly abused his discretion.

Although Respondent dismissed Mr. Silver's petition to quash he, nevertheless, relied on Mr. Silver's contention that the subpoena was a trial subpoena under Rule 45(e) of the Federal Rules. But, Respondent was never made aware of the facts surrounding the issuance of the subpoena. The documents sought therein were originally requested from Mr. Silver over one year prior to trial. It was only due to Mr. Silver's evasiveness and imagination in conjuring up convaluted stories concerning the disappearance of all documents crucial to petitioners case, that the documents were not procured prior to the time the trial began. Petitioner acted in good faith in trying to obtain the requestd checks and only after trial began did Mr. Silver make it absolutely clear that he had absolutely no intention of providing the sought after checks.

Rule 45(d) of the Federal Rules of Civil Procedure authorizes Federal Courts outside the jurisdiction of the situs of a cause of action to issue subpoenas to aid in discovery and to obtain depositions. Rule 45(d)(1) expressly provides that such a subpoena "may command a person to whom it is directed to produce and permit inspection and copying of . . . documents. . . ." While ordinarily such a request for documents under Rule 45(d)(1) is issued

in conjunction with the taking of a deposition, the Supreme Court has recognized that an *ad testificandum* clause is not necessary in a subpoena to compel the production of documents. *Wilson v. United States,* 221 US 361, 372, (1911); *Essgee Co. of China v. United States,* 262 US 151 (1923). *See also, 5 A.J. Moore, Federal Practice,* 45-78 (2nd ed. 1975). Petitioner sought the assistance of the District Court for the Northern District of Georgia pursuant to its Rule 45(d) power, and relying on Supreme Court precedent omitted the *ad testificandum* clause.

Respondent, however, ruled the subpoena invalid under Rule 45(e). That rule applies to the issuance of subpoenas for trial. Respondent cites the case of *United States v. International Business Machines, Corp.,* 71 FRD 88 (S.D.NY. 1978) in support of this conclusion. That case did in fact involve a trial subpoena issued by the wrong Court to obtain document from a prospective witness to be used against that very same witness during examination. The party issuing the subpoena admitted to that fact. In the present petition, however, the documents are not being sought from a prospective witness, neither Trust Company Bank nor any of its officers were called as witnesses nor were intended to be called. Further, the *I.B.M.* case clearly mistakes the law: "[Rule 45(d)] addresses subpoenas *duces tecum* in connection with depositions and neither authorizes nor addresses subpoenas *duces tecum* which are unconnected to a deposition proceeding. . . .". In support the *I.B.M.* Court cites to 5a*J.Moore, Federal Practice* 45-78 (2d.ed. 1975), but on that very page Professor Moore recognizes that "the better authority indicates that oral testimony need not actually be taken." *Id.* See, *Wilson v. United States,* 221 US at 372.

Respondent bases his conclusion on no other authority. Clearly, had petitioner sought to compel the deposition

of an officer of the bank, and included a request for documents, all to be used at trial, Rule 45(d) authorizes an auxilliary Court to open its doors and issue a subpoena for that purpose. The mere fact that Petitioner omitted the *ad testificandum* clause, especially in light of Supreme Court precedent, should not arbitrarily close the doors by attaching a different label.

Therefore, it is apparent that respondent abused his discretion in that there was no evidence upon which to base his decision and that he applied an erroneous conclusion of law.

WHEREFORE, Petitioner respectfully requests that a writ of mandamus issue directing the Respondent, and requiring him to compel the production of those documents requested from Trust Company Bank of Atlanta, Georgia, in the subpoena *duces tecum* issued March 9, 1982.

Respectfully submitted,
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Office - Supreme Court, U.S.
FILED
AUG 10 1982
ALEXANDER L. STEVAS
CLERK

No. 82-142

IN THE

Supreme Court of the United States

October Term, 1982

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Petitioners,

v.

G. ERNEST TIDWELL, Judge of the United States District Court for the Northern District of Georgia,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Respondent Murray M. Silver in Opposition

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Question Presented.

Whether the Eleventh Circuit properly denied petitioners' petition for a writ of mandamus (28 U.S.C. §1651) directed to G. Ernest Tidwell, United States District Judge for the Northern District of Georgia, who had quashed a trial subpoena *duces tecum* (Rule 45[e], F.R.Civ.P.) obtained, issued and served by petitioners in Atlanta, Georgia, directed to a local bank, for the production of bank records for use at a trial then in progress in the United States District Court for the Southern District of New York.

Table of Contents.

	Page
Question Presented	i
Table of Contents	ii, iii
Statement of Facts	2
Reasons for Denying the Writ	7
CONCLUSION: For the foregoing reasons, the petition for a writ of certiorari should be denied.	10

TABLE OF CASES.

CASES CITED:

Allied Chemical Corporation v. Daiflon, Inc. 449 U.S. 33	7
Chandler v. Judicial Council, 398 U.S. 74	7
Kerr v. United States District Court 426 U.S. 394	7
Schlagenhauf v. Holder, 379 U.S. 104	7
Will v. Calvert Fire Insurance Company, 437 U.S. 655	7
Will v. United States, 380 U.S. 90	7

STATUTORY and OTHER AUTHORITIES:

Interim Rules of the Eleventh Circuit Rule 18	6
Rules of Appellate Procedure	

Page

Rule 21(b)..... 6

Rule 38..... 6

Rules of Civil Procedure

Rule 30(b)..... 5

Rule 45(d)..... 5

Rule 45(e)..... 4

United States Code 28 U.S.C. §1651..... i

No. 82-142

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MURRAY NEWMAN and CAPITOL MOTORS, Inc.,

Petitioners,

v.

G. ERNEST TIDWELL JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Respondent Murray M. Silver in Opposition.

Respondent Murray M. Silver respectfully requests that this Court deny the petition for writ of certiorari seeking review of the denial of a writ of mandamus (28 U. S. C. §1651) by the Eleventh Circuit, directed against respondent G. Ernest Tidwell, United States District Judge for the

Northern District of Georgia. The court below did not write any opinion in denying the mandamus petition.

Statement of Facts.

Respondent Murray M. Silver is an attorney practising law in Atlanta, Georgia. During the summer of 1978 he was retained by petitioners Murray Newman and Capitol Motors, Inc., along with a co-defendant, all of whom were engaged in the used car business in Bronx, New York, to represent them in a criminal prosecution against them then pending in the District Court for the Southern District of New York. The charges included "odometer rollbacks," wire fraud and mail fraud, arising out of their conduct of their used car business. These charges were contained in an indictment of sixty-six counts. On August 17, 1978, shortly before the scheduled criminal trial, petitioners and their co-defendant elected to change their pleas from "not guilty" to "guilty," as to a number of counts; and on October 6, 1978 they were sentenced on their pleas of guilty. Shortly thereafter appearing by new counsel, petitioners moved to withdraw their guilty pleas as to the wire fraud and mail fraud counts, but not as to the "odometer rollback" counts. During a hearing before the sentencing judge, they withdrew this motion. Thereafter on motion for reduction of sentence the prison sentence imposed against petitioner Newman was reduced, and he then served his prison sentence.

In March 1980 petitioners commenced an action against respondent Silver in the New York state court, but upon removal petition the action was removed to the District Court for the Southern District of New York. The complaint against Mr. Silver alleged a claim of attorney "malpractice," which was denied. Following the completion of the oral pre-trial depositions conducted by both

sides in the summer of 1980, petitioners sought to depose Mr. Ralph LiButti, the person through whom he met respondent Silver. When Mr. LiButti "resisted" being deposed, and was successful in quashing the deposition subpoena which had been left at his daughter's home, petitioners then moved to add Mr. LiButti as a defendant in the action, upon an amended complaint alleging a conspiracy between Mr. Silver and Mr. LiButti to obtain approximately $200,000.00 from Mr. Newman. The amended complaint also alleged that Mr. Silver shared his legal fees with Mr. LiButti, all of which was denied now by both defendants. In the pre-trial deposition of Mr. LiButti only one question was asked concerning whether Mr. Silver had "ever transferred any money to you" (LiButti deposition, September 10, 1981, Tr. 41), to which Mr. LiButti responded "No." No questions were asked about Mr. Silver's bank accounts at the Trust Company Bank of Atlanta, and no attempt was made during the pre-trial proceedings to depose the bank or to obtain records of Mr. Silver's bank accounts.

Under date of November 16, 1981, District Judge Robert W. Sweet entered a pre-trial order which terminated all discovery proceedings as of January 4, 1982. The order also required plaintiffs to "submit a draft of a pre-trial order to the defendants on or before the completion of discovery," as of the same date. However, no pre-trial order ever was prepared by plaintiffs, and the trial of the case began on January 13, 1982, before Judge Sweet, sitting without a jury, without any pre-trial order being submitted or filed.[1] Later, on January 18, 1982, while Mr.

[1] Parentetically, on the day fixed for the start of the trial, petitioners sought to delay the trial, and when Judge Sweet denied their application, petitioners filed a mandamus petition in the Second Circuit, which promptly denied the petition.

Silver was testifying as a witness, having been called by petitioners, he was served in the court room with a subpoena *duces tecum* for his bank records. Judge Sweet directed Mr. Silver to comply with this subpoena. Some of the records called for by the subpoena were delivered then and there in the court room. The bank records listed in the subpoena were in Atlanta. Mr. Silver returned to Atlanta while the trial was in recess, obtained photocopies of the bank records and these were then submitted both to the court and counsel in the case. Following his receipt of the bank records, petitioners' New York attorney, Robert A. Katz, Esq., focused on certain entries contained therein, and thereupon demanded further bank records. He also requested an order from Judge Sweet that respondent Silver be ordered to sign an authorization to the bank to furnish petitioners with copies of the requested items. At a chambers' conference held on February 26, 1982, Judge Sweet denied petitioners' request for Mr. Silver to sign such authorization. At this point the trial was adjourned to March 16, 1982, for a final session to permit petitioners to question Mr. Silver about his bank records.

Thereafter under date of March 9, 1982, petitioners now acting through Atlanta counsel, obtained a blank form of trial subpoena *duces tecum* (Rule 45[e], F.R.Civ.P.) from the clerk of the District Court for the Northern District of Georgia, had the form typed in and served upon the Trust Company Bank of Atlanta. In completing this subpoena form, petitioners' Atlanta counsel filled in as the caption of the action the trial then in progress in New York, and made it returnable on March 12, 1982, at 3:00 o'clock P.M., before the district court in Atlanta, at no specific place and before no specific judge or magistrate. It should be noted that petitioners did not seek to depose the bank as in discovery proceedings and did not serve and file a

notice to depose the bank under Rule 30(b), F.R.Civ.P; nor obtain a deposition subpoena under Rule 45(d), F.R.Civ.P.

On March 13, 1982, the parties all assembled at the office of the clerk of the district court in Atlanta. The clerk treated the affidavit of Robert A. Katz, Esq., dated March 8, 1982, as a complaint or petition and filed the same in his court records as the opening pleading of a new action, assigning it Docket No. C 82-509A. Respondent Silver then filed a petition with the district court to quash the trial subpoena obtained and issued as described above, and to enjoin the bank from complying with it. The clerk filed this petition in the same proceeding. Thereupon all parties were directed to appear before District Judge G. Ernest Tidwell for a hearing on the entire matter. After argument the court reserved decision. Thereafter Judge Tidwell filed his decision and order quashing petitioners' subpoena, but also incidentally holding that respondent Silver lacked standing to contest "the banks' amenability to compulsory process of this court."[2] Petitioners then appealed to the Eleventh Circuit from Judge Tidwell's order quashing the subpoena.

On March 16, 1982, petitioners applied to Judge Sweet in New York to delay the final session of the trial scheduled for the next day, and again for an order directing Mr. Silver to execute an authorization to the bank to produce the records. Judge Sweet declined to grant the application. On March 17, 1982, the trial was resumed, Mr. Silver appeared and testified, and then at pages 80-81 of the daily transcript, petitioners, through their counsel, made the following statement:

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[2]Respondent Silver disagrees with this ruling, but has not been required to test its correctness.

"Mr. Katz: Your Honor, at this time I have a motion. We have rested."

Having voluntarily rested petitioners' case, without reservation, the proceedings to obtain the bank records became moot.[3]

Petitioners' notice of appeal from Judge Tidwell's order was filed on March 19, 1982, and was assigned Docket No. 82-8173 in the Eleventh Circuit. On April 16, 1982, petitioners filed their mandamus petition, which was assigned Docket No. 82-8197. On April 21, 1982, a panel of the court of appeals (Hill, Vance and Hatchett, CJJ) denied the petition for mandamus without requiring any response thereto (Rule 21[b], F.R.App.P.)

Thereafter, under date of April 28, 1982, respondent Silver moved before the court of appeals to dismiss the appeal from Judge Tidwell's order on grounds that (1) the underlying trial for which the trial subpoena had been obtained was concluded, thereby mooting the appeal; (2) the order from which the appeal was taken was not a final decision, thereby not appealable, and no motion had been made in the district court for an interlocutory appeal (28 U.S.C. §§ 1291, 1292[b]); and (3) the appeal was patently frivolous and without any merit whatsoever (Rule 18 of the Eleventh Circuit's Interim Rules and Rule 38, F.R.App.P). Following petitioners' response to this motion, on June 2, 1982, the court of appeals, by a different panel of judges (Tjoflat, Fay and Henderson, CJJ), dismissed the appeal, stating:

"The appeal is frivolous on its face."

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[3]Respondent Silver has not attempted to respond to petitioners' statement of purported facts in their petition for certiorari (pp. 5-8), believing that such response will not serve any useful purpose. Suffice to state, respondent Silver challenges the correctness, relevance and materiality of many of the statements of purported fact.

Reasons For Denying the Writ.

A long and virtually unbroken line of cases in this Court have held that the remedy of mandamus is a drastic one, to be invoked rarely, and only in extraordinary situations, where the claim to immediate relief is clear and undisputed. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-112 (1964); cf. *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661-662 (1978, plurality opinion); *Chandler v. Judicial Council*, 398 U.S. 74, 89, 112-117 (1970, concurring opinion by Harlan, J).

In the *Allied Chemical* case, *supra*, this Court wrote as follows, *per curiam*:

> "It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas.Co. v. Holland*, 346 U.S. 379, 382-385 (1953); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). On direct appeal from a final decision, a court of appeals has broad authority to 'modify, vacate, set aside or reverse' an order of a district court, and it may direct such further action on remand 'as may be just under the circumstances.' 28 U.S.C. § 2106. By contrast, under the All Writs Act, 28 U.S.C. § 1651 (a), courts of appeals may issue a writ of mandamus only when 'necessary or appropriate in aid of their respective jurisdiction.' Although a simple showing of error may suffice to obtain a reversal on direct

appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.' *Will v. United States*, 380 U.S. 90, 98 n.6 (1967).

"This Court has recognized that the writ of mandamus 'has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Will v. United States, supra*, at 95, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Ibid.*

"The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. See *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976). Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would 'run the risk of defeating the very policies sought to be furthered by that judgment of Congress.' *Ibid.* In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *Kerr v. United States District Court, supra*, at 403; *Roche*

> *v. Evaporated Milk Assn., supra,* at 26, and that he satisfy the 'burden of showing that [his] right to issuance of the writ is "clear and indisputable" ' *Bankers Life & Cas. Co. v. Holland, supra* at 384, quoting *United States v. Duell,* 172 U.S. 576, 582 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain, 'What never? Well, hardly ever' " (449 U.S. at 34-36).

In this case it is clear that petitioners improperly sought to invoke mandamus as a second string to their bow after having appealed from the order of the district court quashing their improperly issued trial subpoena. The court of appeals denied mandamus without requiring respondents to file any response to the petition (see Rule 21[b], F.R.App.P.), and without opinion.

Thereupon respondent Silver moved in the court of appeals to dismiss the appeal taken by petitioners from the order of Judge Tidwell. Respondent Silver set before the court a detailed set of motion papers, including all of the relevant proceedings before Judges Sweet (in New York) and Tidwell (in Atlanta). The court of appeals, by a different panel of judges dismissed the appeal with the succinct entry:

> "The Motion of appellee to dismiss the appeal is granted. The appeal is frivolous on its face."

There is no need to belabor the point. The petition for a writ of certiorari, as with the original appeal from Judge Tidwell's order, "is frivolous on its face."

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 9, 1982

Respectfully submitted,

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